Supreme Court, U.S.
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No. 01-121

IN THE

Supreme Court of the United States

ASSOCIATION OF WASHINGTON PUBLIC HOSPITAL DISTRICTS, ET AL.,

Petitioners,

—v.—

PHILIP MORRIS INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

John W. Phillips
Leonard J. Feldman
Judith H. Ramseyer
HELLER EHRMAN WHITE
& MCAULIFFE LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104
(206) 447-0900

Herbert M. Wachtell
Counsel of Record
Peter C. Hein
Michael A. Charish
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Respondent Philip Morris Incorporated

(*Counsel for other Respondents listed on reverse side of cover*)

August 20, 2001

HOPP

Bradley S. Keller
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

H. Joseph Escher, III
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, California 94111

Attorneys for Respondent
R.J. Reynolds Tobacco

John A. Tondini
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Jeffrey Davidson
Tony L. Richardson
KIRKLAND & ELLIS
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Respondent
Brown & Williamson Tobacco Corp.

Christopher W. Tompkins
BETTS PATTERSON & MINES, P.S.
1215 Fourth Avenue, Suite 800
Seattle, Washington 98161

David W. Smith
Tina M. Schaefer
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Respondent
Lorillard Tobacco Company

Jay R. Henneberry
Susan St. Denis
CHADBOURNE & PARKE LLP
350 South Grand Avenue, Suite 3300
Los Angeles, California 90071

Thomas R. Merrick
BULLIVANT HOUSER BAILEY PC
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Attorneys for Respondent
British American Tobacco
(Investments) Limited

Peter J. McKenna
Eric S. Sarner
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036

Attorneys for Respondent
U.S. Smokeless Tobacco Company

John D. Wilson
David M. Jacobi
WILSON SMITH COCHRAN
& DICKERSON
1215 Fourth Avenue, #1700
Seattle, Washington 98161-1007

Attorneys for Respondent
Smokeless Tobacco Council, Inc.

James R. Murray
Franklin D. Cordell
GORDON MURRAY TILDEN
1325 Fourth Avenue, #1800
Seattle, Washington 98101

Attorneys for Respondent
The Tobacco Institute, Inc.

Bruce G. Merritt
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, New York 10022

Attorneys for Respondent
The Council for Tobacco
Research U.S.A., Inc.

Thomas J. Brewer
The Exchange Building, Suite 2000
821 Second Avenue
Seattle, Washington 98104

Attorney for Respondent
Hill and Knowlton, Inc.

QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the fundamental legal defect in Petitioners' claims:

> Did the Court of Appeals correctly hold (in accord with its prior precedent and that of the other Courts of Appeals) that the Petitioner hospitals districts' RICO and federal antitrust claims were barred because the Petitioners' alleged injury — incurring costs to treat smoking-related personal injuries suffered by their individual patients — was derivative of the personal injuries of the patients, and thus too remote and indirect as a matter of law to permit recovery in an action brought by the Petitioners in their own right?

Petitioners' claims also suffer from multiple additional defects that would provide independent grounds for affirming the decision of the Court of Appeals. *See* pp. 19-20, *infra*.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporation:

British American Tobacco p.l.c.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent British American Tobacco (Investments) Limited ("BATCo") (f/k/a British-American Tobacco Company Limited) has the following parent corporations:

British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
B.A.T. Industries p.l.c.
British American Tobacco (Holdings) Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATCo's stock.

Respondent Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Respondent U.S. Smokeless Tobacco Company (formerly United States Tobacco Company) has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of U.S. Smokeless Tobacco Company's stock.

Respondent The Council for Tobacco Research-U.S.A., Inc. ("CTR") does not have any parent corporations and there is no publicly held company that owns 10% or more of CTR's stock.

Respondent The Tobacco Institute, Inc. ("TI") does not have any parent corporations and there is no publicly held company that owns 10% or more of TI's stock.

Respondent Hill and Knowlton, Inc. has the following parent corporations:

WPP Group Holdings Corp.
WPP Group USA, Inc.
WPPIH 2001, Inc.
Cygnet Holdings, Inc.
Young & Rubicam, Inc.
York Merger Corp.
WPP Luxembourg Gamma SARL
WPP Luxembourg Beta SARL
WPP Luxembourg SARL

WPP North Atlantic Limited
WPP Group plc

WPP Group plc is the only publicly held company that owns 10% or more of Hill and Knowlton, Inc.'s stock.

Respondent Smokeless Tobacco Council, Inc. ("STC") has no parent corporations. There are no publicly held companies that own 10% or more of STC's stock.

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STATEMENT OF THE CASE

This case is one of many brought by health care payors or providers against tobacco companies to recover costs associated with the treatment of *other persons'* personal injuries allegedly caused by smoking. The cases have spawned eleven decisions from the Courts of Appeals, in eight different circuits. In each of those eleven decisions, the Courts of Appeals have ruled — *unanimously*, without a single dissent — that *all* claims, federal and state, must be dismissed as a matter of law because those claims were remote, indirect, and derivative of the personal injuries of individual smokers. The Courts of Appeals also have denied rehearing and rehearing *en banc* in each of the seven cases in which plaintiffs have sought rehearing. And last year, this Court denied petitions for certiorari in the first three such cases to be decided by the Courts of Appeals.

Petitioners here are public hospital districts in the State of Washington (and their trade association) that sought recovery for unreimbursed health care costs allegedly incurred treating patients with tobacco-related illnesses. *See* App. 148a-149a, 152a, 172a-174a; *see also, e.g.*, App. 111a, 121a-122a. In 1999, the Hospital Districts filed a lawsuit in the District Court for the Western District of Washington that asserted federal RICO and antitrust claims as well as state-law claims. Defendants moved to dismiss. *See* App. 148a-149a.

While the motion to dismiss was pending, the Ninth Circuit affirmed the dismissal of a similar case, holding that the claims of plaintiff union health and welfare funds against the tobacco companies were "'too remote' from defendants' alleged wrongdoing" and therefore were barred. *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957, 964 (9th Cir. 1999). Relying on *Oregon Laborers*, the district court in this case dismissed the Hospital Districts' complaint in its entirety. *See* App. 151a.

Plaintiffs in *Oregon Laborers* petitioned this Court for certiorari, as did plaintiffs in similar health care payor suits against the tobacco companies that the Second and Third Circuits had rejected. On January 10, 2000, this Court denied all three petitions. *Oregon Laborers*, 528 U.S. 1075; *Laborers Local* v. *Philip Morris*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080; *Steamfitters* v. *Philip Morris*, 171 F.3d 912 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105.

The Hospital Districts in this case appealed the dismissal of their complaint to the Ninth Circuit. The Ninth Circuit affirmed, adhering to its prior decision in *Oregon Laborers* and relying as well on the similar decisions of the other circuits. The Ninth Circuit held that "[l]ike the union trust funds in *Oregon Laborers*, the Hospital Districts are attempting to recover damages that are derivative of the injuries suffered by smokers" and thus their claims are legally too remote to permit recovery. *See* App. 178a-180a.

The Hospital Districts then petitioned the Ninth Circuit for rehearing and rehearing *en banc*. The panel that decided the case unanimously denied the petition for rehearing, and no judge on the Ninth Circuit requested a vote on whether to rehear the case *en banc*. Order (9th Cir. Apr. 16. 2001). The Hospital Districts now petition this Court for certiorari.

The Petition discusses at length various factual allegations of wrongdoing by defendants. *See*, *e.g.*, Pet. 4-6. But these allegations — which defendants would have contested had the case proceeded beyond a motion to dismiss — do not alter the legal bar that the Ninth Circuit correctly found dispositive.

REASONS FOR DENYING THE WRIT

The decision below is correct and does not conflict with any decisions of other Courts of Appeals or this Court. Thus, review by this Court is not warranted.

In particular, as discussed below, eight Courts of Appeals (in eleven separate decisions, including the decision below) have now unanimously ruled that claims by third-party health care payors or providers against tobacco companies to recover costs incurred to treat personal injuries of individuals must be dismissed because the alleged injury to the payor or provider is remote, indirect, and derivative. In the three such cases in which plaintiffs sought certiorari, this Court denied petitions that presented essentially the same questions and advanced essentially the same arguments as the instant Petition.*

Defendants recognize that the Court is not bound by its prior denials of certiorari. However, in the time since the Court denied certiorari in those three cases in January 2000, subsequent developments have only rendered certiorari *less* appropriate. Thus, since January 2000, *seven* additional Court of Appeals decisions (including decisions from *four* additional circuits) have unanimously *agreed* with the decisions as to which certiorari was previously denied, reiterating that claims of third-party payors or providers against tobacco companies fail as a matter of law.

The conflicts asserted in the Petition are illusory, and rest on misdepictions of both the decision below and decisions of this Court. *See infra* pp. 10-16. And in the face of eleven unanimous Court of Appeals decisions against them, Petitioners rely on earlier *district court* decisions that the Courts of Appeals have *reversed* to support their contention that the questions presented (supposedly) "have divided courts throughout the country." *See* Pet. 27-28.

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* *See supra* p. 2; *compare* Petition *with* petitions for writs of certiorari in Nos. 99-545 (*Steamfitters*), 99-642 (*Oregon Laborers*), and 99-791 (*Laborers Local*).

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

As Petitioners concede, there is no conflict among the Courts of Appeals on the questions presented. Pet. 27 ("No explicit conflict exists among the circuits."); *see also* Pet. 9 n.5. Indeed, *eight* different Courts of Appeals have considered claims by health care payors or providers — ranging from union funds to hospitals to Blue Cross insurers to foreign governments — to recover health care costs incurred to treat personal injuries allegedly caused by smoking. And all eight Courts of Appeals *unanimously* and correctly have held that such claims must be dismissed because the injury alleged is remote, indirect, and derivative, and the complaints therefore failed to allege an injury proximately caused by defendants' alleged wrongdoing:

- **Second Circuit:** "[T]he economic injuries alleged in plaintiffs' complaint are purely derivative of the physical injuries suffered by [smokers] and therefore too remote as a matter of law for them to have standing to sue defendants." *Laborers Local*, 191 F.3d at 244.
- **Third Circuit:** "[D]ue to the remoteness of the Hospitals' injuries, this third-party suit ... may not proceed." *Allegheny Gen. Hosp.* v. *Philip Morris*, 228 F.3d 429, 445 (3d Cir. 2000); *see also Steamfitters*, 171 F.3d at 928 (plaintiffs' claims "necessarily fail for being too remotely connected in the causal chain from any wrongdoing on defendants' part").
- **Fifth Circuit:** "[T]he loss suffered by insurers is too remote from the manufacture and sale of cigarettes to justify direct recovery by the [plaintiffs] .... " *Texas Carpenters* v. *Philip Morris*, 199 F.3d 788, 789 (5th Cir. 2000).
- **Seventh Circuit:** "The injury for which the plaintiffs seek compensation is remote indeed ...." *Int'l Bhd. of*

Teamsters v. *Philip Morris*, 196 F.3d 818, 825 (7th Cir. 1999).

- **Eighth Circuit:** "We agree with the ... other circuits that have denied antitrust and RICO standing to ERISA plans who seek to recover for this type of indirect injury." *Lyons* v. *Philip Morris*, 225 F.3d 909, 914 (8th Cir. 2000).

- **Ninth Circuit:** "[P]laintiffs' RICO and antitrust claims are 'too remote' from defendants' alleged wrongdoing to allow recovery." *Oregon Laborers*, 185 F.3d at 964; *see also Regence Blueshield* v. *Philip Morris*, 2001 WL 205996, at *2 (9th Cir. 2001) (unpublished disposition) (plaintiffs' "alleged damages are ... derivative of the personal injuries of smokers"); *Association of Washington Public Hosp. Dists.*, App. 169a-187a.

- **Eleventh Circuit:** "[A]ll of Plaintiff's claims, as a matter of law, are barred by the doctrine of proximate cause." *United Food and Commercial Workers Unions* v. *Philip Morris*, 223 F.3d 1271, 1273 (11th Cir. 2000).

- **District of Columbia Circuit:** Plaintiffs' "claims are too remote, contingent, derivative, and indirect to survive." *Service Employees Int'l Union* v. *Philip Morris*, 249 F.3d 1068, 1076 (D.C. Cir. 2001) (internal quotation marks omitted).

The remarkable uniformity of result in these eleven decisions from eight circuits does more than demonstrate the absence of a circuit split that might warrant this Court's review. It radically undermines Petitioners' repeated claim that the issue of third-party-payor standing is a "difficult" one that demands this Court's guidance. *See* Pet. 12-13, 30.

The issue here is not difficult. As shown in the next section, the conclusion that all eight circuits have reached is compelled by a legal principle that has been the settled law of this Court and this country for over 150 years. As set forth

in *Holmes* v. *SIPC*, 503 U.S. 258, 268-69 (1992): a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT.

A. This Court's decisions mandate the dismissal of Petitioners' remote claims.

There is no conflict between the Ninth Circuit's decision below and any decision of this Court. To the contrary, as the Courts of Appeals have recognized, dismissal of payor and provider claims to recover health care costs incurred to treat smokers follows inexorably from this Court's precedents. As this Court observed in *Holmes*, a tortious act will often cause "ripples of harm" extending to various persons. 503 U.S. at 266 n.10. For example, an insurance company may suffer loss when an insured is injured, or an employer may incur costs when an employee is harmed. However, long-standing principles of law bar persons who suffer indirect and derivative injuries by virtue of their contractual or other legal relationships with direct victims from recovering in their own right from the tortfeasor.

The rule barring claims for remote and indirect injuries springs from that aspect of the common law doctrine of proximate cause that "demand[s]" a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. No fewer than four decisions of this Court articulate this "requirement" of direct injury — "one of [the] central elements" of proximate causation. *Id.* at 269.

Thus, in 1877, in *Mobile Life Ins. Co.* v. *Brame*, this Court barred a life insurer's attempt to recover directly from the murderer of its insured, reasoning: "The injury inflicted by

[the defendant murderer] was upon [the insured], against his personal rights; that it happened to injure the plaintiff [insurance company] was an incidental circumstance, a remote and indirect result .... " 95 U.S. 754, at 758-59. This Court added: "we are not cited to any case in this country or Great Britain where a different doctrine has been held." *Id.* at 759.

Thereafter, in *United States* v. *Standard Oil*, 332 U.S. 301, 311-16 (1947), this Court held that the federal government did not have a direct right of action under the common law to recover from a tortfeasor health care costs incurred by the government as a result of tortious injury to a soldier. This Court made clear that no such cause of action existed, and declined to create one.

In two subsequent decisions, this Court expressly incorporated the settled common-law bar to recovery for remote injuries into the antitrust laws and RICO. *Associated Gen. Contractors* v. *California State Council*, 459 U.S. 519, 531-33 (1983) ("*AGC*"); *Holmes*, 503 U.S. at 268-71.

In *AGC*, this Court held that Congress intended common law principles of proximate causation, directness of injury, and certainty of damages to apply to antitrust damages litigation. *See* 459 U.S. at 532-33. *AGC* illustrates the rule barring remote and indirect claims with an example drawn from the facts of the seminal case of *Anthony* v. *Slaid*, 52 Mass. 290 (Mass. 1846) (Shaw, C.J.). *See* 459 U.S. at 532 n.25. Anthony, who had contracted to support a town's poor, sued for his increased medical expenditures after the defendant's wife assaulted a pauper. The Massachusetts Supreme Judicial Court unanimously denied recovery. The court concluded that the *town* could not sue a tortfeasor for medical expenses resulting from an assault on a town pauper; therefore, a party that had *contracted with* the town to pay its paupers' expenses could not maintain such a suit. Notwithstanding the intentional nature of the tort, the injury to Anthony was "too remote and indirect." 52 Mass. at 291.

Thereafter, in *Holmes*, this Court held that RICO likewise adopted the common law "demand" for a "direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The Court held that the Securities Investor Protection Corporation — which stood in the shoes of customers of two different broker-dealers — was not entitled to pursue RICO claims against insiders whose stock manipulation had caused the failure of the broker-dealers, which in turn had caused the customers' loss. While the manipulation caused cognizable harm to the broker-dealer, this Court held that "the link is *too remote* between the stock manipulation alleged and the customers' harm." *Id.* at 271 (emphasis added).*

Thus, the injury the Hospital Districts allege — incurring health care costs to treat personal injuries suffered by patients allegedly injured by smoking (*see supra*, p. 1) — falls squarely within a category of injuries that has been held to be remote, indirect, and derivative for over 150 years. As the Ninth Circuit recognized, "[w]ithout any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." App. 178a (quoting district court opinion at App. 155a). Hence, the Hospital Districts seek recovery for "harm that is derivative of personal injuries visited upon their patients,"

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* Petitioners offer an interpretation of RICO's legislative history based on an American Bar Association comment (Pet. 16 n.9), but fail to mention that the *Holmes* Court found "*no merit* in [plaintiff's] reliance" on that same comment. *Holmes*, 503 U.S. at 270 n.15 (emphasis added). The Court stated that the plaintiff misconstrued the import of the American Bar Association comment, and that, in any event, it amounted to no more than "background noise drowned out by the statutory language." *Id.* Similarly, *Perma Life Mufflers* v. *Int'l Parts Corp.* (Pet. 16) avails Petitioners nothing. This Court held in *Perma Life Mufflers* that Congress did not intend to incorporate the common-law defense of *in pari delicto* into antitrust actions. *See* 392 U.S. 134, 138 (1968). In contrast, this Court held in *AGC* and *Holmes* that Congress *did* intend to incorporate the common-law requirement of proximate cause at issue here into antitrust and RICO actions.

and their claims are legally too remote to permit recovery. App. 180a.

Indeed, the injury the Hospital Districts allege is *even more* remote and indirect than the injuries held non-actionable in *AGC* and *Holmes*. As in *AGC* and *Holmes*, the injury Petitioners allegedly suffered (unreimbursed health care costs) is an indirect and derivative consequence of prior harm visited on *other* persons. But the plaintiffs in *AGC* and *Holmes* at least asserted an injury separate from that of the directly injured party. Not so here. Here, the Hospital Districts' alleged injury is *further* derivative of the harm visited on *other* persons because the only injury the Hospital Districts allege is the *treatment of those other persons' injuries*.

And the fact that plaintiffs here are hospitals districts, which provide health care directly to patients (*see* Pet. 24-25), does not alter the analysis. As the Ninth Circuit properly held: "The differences between health care providers and third party payers ... do nothing to remedy the fundamental defect with the Hospital Districts' claims: they are attempting to recover for harm that is derivative of personal injuries visited upon their patients." Accordingly, "[t]heir claims are just as remote" as those of third-party payors. *See* App. 179a-180a. The Third Circuit reached that same conclusion in rejecting a similar hospital suit against defendants. *See Allegheny Gen. Hosp.*, 228 F.3d at 441 ("[t]he Hospitals' injuries are still derivative of ... patients' injuries," even though they provide health care directly).

Indeed, the proximate-cause bar against derivative and remote claims makes perfect sense as applied to hospitals. As the District Court explained in its opinion below:

> [H]ospitals may not generally sue companies who have caused their patients' illnesses. Could plaintiffs sue an auto manufacturer for the unreimbursed costs of treating a patient injured as a result of a defective car?

> Could plaintiffs sue food manufacturers for the unreimbursed costs of treating persons injured as a result of food poisoning? In these hypothetical cases, plaintiffs could not show that the defendant's actions proximately caused their injuries. The same is true here.

App. 159a; *see also Allegheny*, 228 F.3d at 445.*

B. Petitioners mischaracterize the decision below and decisions of this Court in an effort to manufacture a conflict.

1. The Ninth Circuit did not announce a test that conflicts with this Court's decisions. *First*, the Ninth Circuit's holding that Petitioners' claims fail because "there is no *direct* link between the alleged misconduct of the [defendants] and the Hospital Districts' claimed damages" (App. 178a) does *not* "mark[ ] ... a deviation from this Court's analysis," as Petitioners claim. *See* Pet. 10. Rather, the Ninth Circuit correctly focused on the nature of the alleged *injury*, and its relation to the defendant's conduct. As this Court held in *Holmes*, proximate cause "demand[s]" as one of its

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* Nor does Petitioners' status as political subdivisions exempt them from the proximate-cause bar against remote, indirect, and derivative claims. *First*, political subdivisions such as the Hospital Districts are solely creatures of their enabling statutes and are not sovereign entities. *See, e.g., Waller* v. *Florida*, 397 U.S. 387, 392 (1970) ("Political subdivisions of states — counties, cities, or whatever — never were and never have been considered as sovereign entities."). *Second*, the bar against remote, indirect, and derivative claims is a "common law rule of general application" (*see Laborers Local*, 191 F.3d at 243), which applies with equal force to sovereign entities. Indeed, in *United States* v. *Standard Oil*, this Court rejected the remote, indirect, and derivative claims of no less a sovereign than the United States government, which sought to recover in its own right from a tortfeasor the costs of health care that the government *provided* to one of its injured soldiers. *See* 332 U.S. 301, 302, 304 n.5, 311-16 (1947); 153 F.2d 958, 959, 963 n.6 (9th Cir. 1946) (making clear that the United States itself "supplied" the soldier's health care); *see also, e.g., Service Employees*, 249 F.3d at 1073, 1075 (rejecting suits against tobacco companies by Republics of Guatemala, Nicaragua, and Ukraine on remoteness grounds).

"central elements" a "*direct relation* between the *injury* asserted and the *injurious conduct* alleged." 503 U.S. at 268-69 (emphasis added).

The Ninth Circuit simply applied this principle from *Holmes* to the case at bar. It found no "direct link" between the "alleged misconduct" and the "claimed damages" because the *injury* alleged was "*derivative* of the injuries suffered by smokers ... [w]ithout any injury to smokers, [Petitioners] would not have incurred the additional expenses in paying for the medical expenses of those smokers." App. 178a (emphasis added). And in so finding, the Ninth Circuit expressly concurred with the unanimous opinions of its "sister circuits." *See id.*

The Ninth Circuit's decision does *not* conflict with this Court's decision in *NOW* v. *Scheidler*, as Petitioners contend. *See* Pet. 20-21 (citing 510 U.S. 249 (1994)). In fact, as the Ninth Circuit pointed out, *NOW* concerned "constitutional standing, not RICO or antitrust standing." App. 181a n.4. The only issue on which this Court granted certiorari in *NOW* was whether an economic motive was required for a RICO claim, and the only standing issue addressed by this Court was the "threshold" issue whether plaintiffs had jurisdictional, *i.e.*, Article III, standing — which requires only injury-in-fact and *not* the proximate cause requirement of direct injury that bars plaintiffs' claims here. 510 U.S. at 252, 255-56.

And although this Court in *Sedima* v. *Imrex*, 473 U.S. 479, 497 (1985), noted generally that "RICO is to be read broadly," the case did not involve any issue of proximate cause or standing to pursue RICO claims for remote, indirect, and derivative injuries. Thereafter, in *Holmes*, this Court squarely held that — notwithstanding the "congressional admonition that RICO be 'liberally construed to effectuate its remedial purposes'" — Congress intended to require direct injury in RICO actions. 503 U.S. at 265-68, 274. As

this Court stated, "[a]llowing suits by those injured only indirectly" actually would "'*undermine[ ]* the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *AGC*, 459 U.S. at 545) (emphasis added).*

Second, Petitioners mistakenly assert that the Ninth Circuit based its ruling on a bright-line "Direct Link Test" and (supposedly) treated "almost as an afterthought" a multi-factor remoteness analysis, which Petitioners assert must be applied anew on an *ad hoc* basis in each case. *See* Pet. 19-20. But, to the contrary, the Ninth Circuit stated: "To determine whether an injury is 'too remote' to allow recovery under both the antitrust laws and RICO, a three-factor test is applied ...." App. 176a. The Ninth Circuit explicitly analyzed the "*AGC/Holmes*" "factors" in light of Petitioners' allegations and (following *Oregon Laborers*) concurred with the District Court below that each of these factors "*weighs strongly against* according the [plaintiffs] antitrust and RICO standing." App. 177a-178a (emphasis added). Thus:

- **Speculative nature of the harm.** The Ninth Circuit recognized the difficulty that would be entailed in calculating Petitioners' alleged damages, which would require "considerable speculation regarding how individuals' tobacco usage would have changed in the event that accurate information and less harmful tobacco products were available." App. 179a; *see also, e.g., Laborers Local*, 191 F.3d at 239-40 (describing plaintiffs' alleged

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* Petitioners further err in contending that the Ninth Circuit's decision conflicts with certain lower court decisions. *See* Pet. 21. For example, in *Israel Travel Advisory*, the Seventh Circuit affirmed the *dismissal* of the plaintiff's RICO claims, concluding that — in light of *Holmes* — "firms suffering derivative injury from business torts" *cannot* resort to RICO. 61 F.3d 1250, 1258 (7th Cir. 1995). And the Seventh Circuit's subsequent decision in *Teamsters* makes clear that in the context of payor/provider cases against the tobacco companies, the Seventh Circuit wholeheartedly *agrees* with the Ninth Circuit decision below. *See* 196 F.3d 818 (7th Cir. 1999).

damages as "incredibly speculative," "the sheerest sort of speculation," and "virtually impossible to determine").*

- **Risk of duplicative recovery / complex apportionment of damages.** The Ninth Circuit recognized that suits by individual smokers pose a risk of duplicative recovery. App. 179a; *see also, e.g., Service Employees*, 249 F.3d at 1075 ("courts would be required to allocate damages among various classes of directly and indirectly injured parties ... in a manner that protects the tobacco industry from being held repeatedly liable for the same alleged wrongdoing"). And as the Ninth Circuit also recognized, the Master Settlement Agreement between certain states and the tobacco companies has "no bearing" on the risk of duplicative recovery from individual smoker suits. App. 179a n.2.

- **Deterring injurious conduct.** The Ninth Circuit recognized that smokers are the "'more direct victims' who can vindicate the public interest in deterring" any injurious conduct by defendants. App. 179a; *see also, e.g., Laborers Local*, 191 F.3d at 241 (actions by smokers will "promote 'the general interest in deterring injurious conduct,' which *Holmes* noted as the objective of this policy factor").**

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* *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981) (cited at Pet. 25) is inapposite. That case did not involve any issue of directness of injury or proximate cause, but rather the *separate* requirement that a plaintiff must prove damages with requisite certainty to satisfy the requirement of *antitrust injury*.

** In any event, Defendants respectfully submit that *AGC* and *Holmes* do not require that the "factors" discussed therein — which *Holmes* described as "*reasons*" for the "directness of relationship" "*requirement*" (503 U.S. at 269 (emphasis added)) — be applied anew in every case, even in categories of cases in which the principles of proximate causation are long-settled, as they are here. *See* pp. 5-10, *supra*. Although a black-letter rule cannot be announced that would dictate the result in "every case" (as this Court observed in *AGC*, 459 U.S. at 536, and *Holmes*, 503 U.S. at

2. This Court's standing analysis does *not* assume the existence of a "proper plaintiff" for every antitrust or RICO violation. Relying on a reversed district court decision, Petitioners argue that the Ninth Circuit misconstrued the standing analysis of this Court's precedent, which supposedly reflects a "search for [the] proper plaintiffs." Pet. 18. Essentially, Petitioners argue that some plaintiff must always be afforded standing to bring a federal treble damages suit under RICO or the antitrust laws for every violation, no matter how remote, indirect, and derivative the plaintiff's injury.

But *AGC* explicitly rejected any contention that there must always be a plaintiff with standing to bring a federal statutory treble damages suit: "*Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.*" 459 U.S. at 534 (emphasis added); *see also Holmes*, 503 U.S. at 268 (proximate cause is a "judicial tool[ ] used to limit a person's responsibility for the consequences of [his] acts"); *Schlesinger* v. *Reservists Committee*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). Thus, as the D.C. Circuit stated in *reversing* the district court decision on which Petitioners rely:

272, n.20), that does not mean that *no* black-letter rule can ever be announced that would require dismissal in *any* case. For example, it is uniformly settled that a corporate shareholder may not bring a "direct" claim to recover for diminution to the value of his shares occasioned by injury to the corporation. Thus, there is no need in each attempted "direct" suit by a shareholder to engage in a case-by-case analysis of the policy factors; rather, it is well-settled that the shareholder's only recourse lies in bringing a derivative suit on behalf of the corporation. Nor should there be any need to engage in an *ad hoc* review of the policy factors here where another long-settled rule likewise applies to require dismissal, to wit, "plaintiffs who are obligated to pay the medical expenses of another may not recover against the tortfeasor who caused the damage." *Laborers Local*, 191 F.3d at 237.

> The [plaintiffs] err in assuming that the proximate cause analysis called for by *AGC* and *Holmes* is a quest for the "best" (or, realistically, "least bad") plaintiff. Rather, the Supreme Court has insisted on an appropriate plaintiff, namely, a plaintiff whose alleged injury possesses a sufficiently direct causal relationship to the alleged wrongdoing.

Service Employees, 249 F.3d at 1072.

Ironically, Petitioners also attempt to support their must-always-be-a-plaintiff theory with antitrust cases that establish a rule (the "direct-purchaser" rule) *barring* another species of indirect claims. *See* Pet. 18 (relying on *Hanover Shoe*, 392 U.S. 481 (1968) and *Illinois Brick*, 431 U.S. 720 (1977)). Although the direct-purchaser-rule decisions consider which categories of plaintiffs would have incentive to sue in analyzing antitrust standing, they do not address the separate proximate-cause requirement that this Court subsequently enunciated in *AGC*, and they certainly do *not* suggest that some plaintiff must always have standing no matter how indirect and remote that plaintiff's injury. "The direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of [*AGC*] are analytically distinct." *Teamsters*, 196 F.3d at 828.*

Moreover, Petitioners' theory turns Congressional intent on its head. The inability of those directly injured (*i.e.*, individual smokers) to sue under RICO or the antitrust laws for their health care costs because personal injuries are not injuries to "business or property", *see* pp. 19-20, *infra*, is hardly a point in *favor* of allowing Petitioners — who are

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* Petitioners further quote a passage from *California* v. *ARC America* that discusses *Illinois Brick*. Pet. 18 (citing 490 U.S. 93, 104 (1989)). *ARC America* itself does not rule on antitrust standing but simply holds that federal antitrust law does not preempt state-law indirect-purchaser statutes, which may allow indirect purchasers to sue under *state* antitrust laws.

only indirectly injured — to sue under these federal statutes for those same injuries. This would flout Congress' policy determination not to permit recovery of personal injury damages, including health care costs, in RICO or antitrust treble damage actions — no matter by whom asserted. *See, e.g., Laborers Local*, 191 F.3d at 241 ("the lack of a RICO damages remedy for even direct personal injuries ... actually weighs heavily *against* RICO standing for parties (such as the Funds) alleging harms that are purely contingent on personal injuries suffered by others") (emphasis added).

In sum, the Ninth Circuit's decision faithfully applies settled principles set forth in this Court's precedents. Review should be denied.

III. THE RICO AND ANTITRUST STANDING ISSUES HAVE *NOT* "DIVIDED COURTS THROUGHOUT THE COUNTRY."

Petitioners' claim that the RICO and antitrust standing issues in this case have "divided courts throughout the country" (Pet. 27-28) is plainly incorrect. Every federal Court of Appeals to have addressed these issues *unanimously* has ruled that health care payors or providers cannot sue tobacco companies under RICO or antitrust law to recoup health care costs allegedly associated with smoking. *See supra* pp. 4-5. Numerous district courts have issued decisions to the same effect.* The district court and state court decisions Petitioners cite either have been reversed or are inapposite:

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* *See, e.g., Acoma Pueblo* v. *American Tobacco*, No. CIV 99-1049M/WWD, slip op. (D.N.M. July 30, 2001); *Rhode Island Laborers'* v. *Philip Morris*, 99 F. Supp. 2d 174 (D.R.I. 2000); *Arkansas Carpenters'* v. *Philip Morris*, 75 F. Supp. 2d 936 (E.D. Ark. 1999); *Contractors, Laborers* v. *Philip Morris*, No. 8:98CV364, slip op. (D. Neb. Feb. 18, 1999); *Laborers' & Operating Engineers'* v. *Philip Morris*, 42 F. Supp. 2d 943 (D. Ariz. 1999); *Hawaii Health & Welfare Trust Fund* v. *Philip Morris*, 52 F. Supp. 2d 1196 (D. Haw. 1999); *Williams & Drake* v. *American Tobacco*, No. 98-553, slip op. (W.D. Pa. Dec. 21, 1998);

- The district court decisions in *Service Employees* and *Arkansas Blue Cross* have been *reversed*. *See Service Employees*, 249 F.3d 1068 (D.C. Cir. 2001); *Teamsters*, 196 F.3d 818 (7th Cir. 1999) (reversing *Arkansas Blue Cross*).*

- In *Iron Workers* v. *Philip Morris*, 23 F. Supp. 2d 771 (N.D. Ohio 1998), all federal claims ultimately were *dismissed*. Only an Ohio state-law claim proceeded to trial, and the jury returned a unanimous verdict for the defendants on that claim. *See Iron Workers*, 29 F. Supp. 2d 801 (1998) (granting summary judgment dismissing federal antitrust claims); bench order (Mar. 5, 1999) (directing verdict dismissing RICO claims), order (Mar. 22, 1999) (rendering judgment for defendants upon jury verdict).

- In *Texas* v. *American Tobacco*, 14 F. Supp. 2d 956 (E.D. Tex. 1997), the district court dismissed the state's antitrust claim, but allowed its RICO claim to proceed based on the *state's* assertedly unique quasi-sovereign interests in "protecting the ... populace of the State." *Id.* at 968. But the Fifth Circuit subsequently agreed with other Courts of Appeals that all health care payor or provider claims against the tobacco companies (including RICO claims) must be dismissed. *See Texas Carpenters* v. *Philip Morris*, 199 F.3d 788, 789-90 (5th Cir.

Seafarers Welfare Plan v. *Philip Morris*, 27 F. Supp. 2d 623 (D. Md. 1998); *Southeast Florida Laborers* v. *Philip Morris*, 1998 WL 186878 (S.D. Fla. Apr. 13, 1998).

* Yet another argument that Petitioners base on the reversed district court decision in *Service Employees* is that the alleged foreseeability of their harm favors granting them standing. *See* Pet. 25-26. But the D.C. Circuit expressly rejected this argument too in reversing the district court decision: "The circuits have rejected the contention that specific intent ... or the foreseeable nature of the harms alleged is sufficient to satisfy the proximate cause requirement." 249 F.3d at 1074. "'Foreseeability and direct injury (remoteness) are distinct concepts, both of which must generally be established by a plaintiff.'" *Id.* at 1076 (quoting *Laborers Local*, 191 F.3d at 236).

2000). And, in any event, Petitioners here are not states and do not possess quasi-sovereign interests.*

- *Florida* v. *American Tobacco*, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996), "was based upon *Florida's* RICO act, not the federal statute" and upon the state's assertedly special status as a plaintiff. *See Seafarers* v. *Philip Morris*, 27 F. Supp. 2d 623, 632 n.23 (D. Md. 1998) (emphasis added).

- As Petitioners acknowledge (Pet. 28), *Minnesota* v. *Philip Morris*, 551 N.W.2d 490 (Minn. 1996), concerned an assertedly broader Minnesota antitrust statute, not the federal antitrust laws. In dictum, the Minnesota court stated that it would agree with the Seventh Circuit's federal antitrust decision in *Blue Cross & Blue Shield* v. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995). But the Seventh Circuit itself subsequently held that *Marshfield Clinic* does *not* support standing for third party payors or providers suing tobacco companies. *See Teamsters*, 196 F.3d at 826-27.**

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* *See, e.g., Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982) (quasi-sovereign interests are "a set of interests that the *State* has in the well-being of its *populace*") (emphasis added); *Waller* v. *Florida*, 397 U.S. 387, 392 (1970) (cited *supra*, p. 10 n.*).

** Petitioners also cite the oft-criticized district court decision in *Blue Cross and Blue Shield of N.J.* v. *Philip Morris*, 36 F. Supp. 2d 560, 584 (E.D.N.Y. 1999) (Weinstein, J.). *See* Pet. 12. However, *Blue Cross* is inconsistent with all of the Court of Appeals decisions, including the *Laborers Local* decision in the Second Circuit. Indeed, the Seventh Circuit "disapproved" the *Blue Cross* decision, stating that it "fails to anticipate the second circuit's conclusion in *Laborers Local*" and that the amended version of the decision is "a thinly disguised refusal to accept and follow the second circuit's holding" in *Laborers Local*. *See Teamsters*, 196 F.3d at 827. Other courts likewise have criticized the *New Jersey Blue Cross* decisions. *See, e.g., Allegheny Gen. Hosp.*, 228 F.3d at 436 n.5, 444-45, 445 n.11; *Rhode Island Laborers'* v. *Philip Morris*, 99 F. Supp. 2d 174, 177-78 (D.R.I. 2000).

Finally, there is no "practical conflict" between the Ninth Circuit's decision and the tobacco companies' settlement of cases brought by state attorneys general. *See* Pet. 29. Among other things, the Hospital Districts are not state governments. Petitioners quote the Third Circuit's decision in *Steamfitters* as noting an "arguabl[e] ... tension" between its decision and the state settlement, but fail to quote the Third Circuit's subsequent statement that "an explanation for th[is] putative tension may be found in any number of places." *See* Pet. 29 n.11; *Steamfitters*, 171 F.3d at 934 n.18. In any event, a purported "practical conflict" between the Ninth Circuit's decision and a *settlement* of other cases could not possibly justify this Court's certiorari review.

IV. INDEPENDENT GROUNDS WOULD JUSTIFY AFFIRMING THE DECISION BELOW

Review of the Ninth Circuit decision below is further unwarranted because there exist multiple grounds for affirming the decision, and review would not lead to reversal. The following are among the alternative grounds for affirmance:

1. Petitioners' RICO and antitrust claims are barred not only because they are impermissibly remote but also because health care costs occasioned by personal injuries are not injury to "business or property." 15 U.S.C. § 15; 18 U.S.C. § 1964(c); *see also Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). The health care costs the Hospital Districts seek to recover are an integral component of their patients' personal injury claims (*see, e.g., Metro-North* v. *Buckley*, 521 U.S. 424, 438-39 (1997); 2 Dobbs, *Law of Remedies* §§ 8.1(1), (3) (2d ed. 1993)), and accordingly do not constitute "business or property" injury. *See, e.g., Laborers Local*, 191 F.3d at 241; *Oregon Laborers*, 185 F.3d at 964, 968; App. 183a-184a. To permit third-party payors or providers to characterize the costs of treating personal injuries allegedly inflicted upon others as "business or property" injury to themselves would sanction a form of legal

alchemy that would permit state-law claims for personal injuries to be transformed into federal antitrust and RICO treble damages claims, simply because some third person paid for or provided the injured person's health care. There is no basis for such a result.

2. As the Ninth Circuit held, Petitioners' antitrust claims fail because they do not allege "antitrust injury," which requires "the plaintiff to have suffered its injury in the market where competition is being restrained." App. 182a (internal quotation marks omitted). The Hospital Districts allege that they were potential participants in the "nicotine delivery market" and that defendants illegally restrained that market. *See* App. 113a, 182a. But even if those allegations were credited, the *injury* the Hospital Districts suffered from the alleged restraint — increased health care costs — occurred in the *health care* market, not in the "nicotine delivery market." Thus, Petitioners did not suffer antitrust injury. App. 182a; *see also Oregon Laborers*, 185 F.3d at 966-67; *Teamsters*, 196 F.3d at 825.

Petitioners' reliance upon *Blue Shield* v. *McCready*, 457 U.S. 465 (1982) (*see* Pet. 26-27), is unavailing. In *McCready*, defendants allegedly restrained the market for psychotherapy services, and it was in *that same market* that the plaintiffs — consumers of psychotherapy services — suffered injury. Moreover, as the Ninth Circuit and other Courts of Appeals correctly have held, *McCready* does not support health care payors or providers' attempts to recover for their alleged indirect harm since (as this Court noted in *AGC*, 459 U.S. at 540 n.44) the plaintiff in *McCready* was *directly* injured as a participant (buyer) in the market for psychotherapy services. *See, e.g.*, App. 180a-181a; *Allegheny Gen. Hosp.*, 228 F.3d at 438 ("proximate cause and standing for the Hospitals' antitrust claims do not exist under *McCready*").*

* In addition, as a matter of law, Petitioners cannot plead justifiable reliance on defendants' allegedly misleading statements. Court after court has recognized that the health risks associated with smoking are a matter

V. CERTIORARI IS INAPPROPRIATE IN ANY EVENT AS TO PETITIONERS' STATE-LAW CLAIMS.

The substance of the Petition, and its Questions Presented, relate exclusively to Petitioners' federal RICO and antitrust claims. But in a footnote, Petitioners claim that they also "seek certiorari and reversal of the Ninth Circuit Decision on proximate cause as it relates to *all* of their claims" — an apparent reference to Petitioners' Washington state-law claims. *See* Pet. 7 n.2 (emphasis added).

There is no basis for this Court to grant certiorari review of the dismissal of Petitioners' state-law claims. Since Petitioners failed to include the state-law claims within the scope of their questions presented (and failed to present any argument as to the certworthiness of those claims), the Court should not consider them. *See, e.g.*, Supreme Court Rule 14.1(a); *Izumi Seimitsu* v. *U.S. Philips Corp.*, 510 U.S. 27, 30-32 & n.5 (1993). Beyond this procedural defect, Petitioners' arguments for certiorari — such as the asserted importance of the RICO and antitrust issues and purported conflicts with other decisions — simply do not apply to Petitioners' Washington state-law claims. And, in any event, the courts below properly rejected these claims. *See* App. 163a-168a, 183a-187a.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

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of long-standing common knowledge. *See, e.g., FDA* v. *Brown & Williamson*, 529 U.S. 120, 137-40 (2000); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996). Plaintiffs here are *hospital* districts that assertedly "research, fund and promote wellness and health lifestyle programs." App. 16a. The Hospital Districts' access to the body of knowledge regarding risks associated with smoking precludes them from claiming they were deceived by defendants. *See Teamsters*, 196 F.3d at 826.

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Respectfully submitted,

Herbert M. Wachtell
Counsel of Record
Peter C. Hein
Michael A. Charish
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019

John W. Phillips
Leonard J. Feldman
Judith H. Ramseyer
HELLER EHRMAN WHITE
& MCAULIFFE LLP
701 Fifth Avenue, Suite 6100
Seattle, Washington 98104

Attorneys for Respondent
Philip Morris Incorporated

Bradley S. Keller
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

H. Joseph Escher, III
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Three Embarcadero Center, 7th Floor
San Francisco, California 94111

Attorneys for Respondent
R.J. Reynolds Tobacco

John A. Tondini
BYRNES & KELLER, LLP
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Jeffrey Davidson
Tony L. Richardson
KIRKLAND & ELLIS
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Respondent Brown & Williamson Tobacco Corp.

Christopher W. Tompkins
BETTS PATTERSON & MINES, P.S.
1215 Fourth Avenue, Suite 800
Seattle, Washington 98161

David W. Smith
Tina M. Schaefer
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

Attorneys for Respondent Lorillard Tobacco Company

Jay R. Henneberry
Susan St. Denis
CHÀDBOURNE & PARKE LLP
350 South Grand Avenue, Suite 3300
Los Angeles, California 90071

Thomas R. Merrick
BULLIVANT HOUSER BAILEY PC
1000 Second Avenue, 38th Floor
Seattle, Washington 98104

Attorneys for Respondent
British American Tobacco
(Investments) Limited

Peter J. McKenna
Eric S. Sarner
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
Four Times Square
New York, New York 10036

Attorneys for Respondent
U.S. Smokeless Tobacco Company

John D. Wilson
David M. Jacobi
WILSON SMITH COCHRAN
& DICKERSON
1215 Fourth Avenue, #1700
Seattle, Washington 98161-1007

Attorneys for Respondent
Smokeless Tobacco Council, Inc.

James R. Murray
Franklin D. Cordell
GORDON MURRAY TILDEN
1325 Fourth Avenue, #1800
Seattle, Washington 98101

Attorneys for Respondent
The Tobacco Institute, Inc.

Bruce G. Merritt
DEBEVOISE & PLIMPTON
919 Third Avenue
New York, New York 10022

Attorneys for Respondent
The Council for Tobacco Research
U.S.A., Inc.

Thomas J. Brewer
The Exchange Building, Suite 2000
821 Second Avenue
Seattle, Washington 98104

Attorney for Respondent
Hill and Knowlton, Inc.